FAIRMONT CABLE TV

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May 15, 1996

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554
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DOCKET FILE COPY ORIGINAL

Re: MM Docket No 92-266; CS Docket No. 96-60

Dear Secretary:

Enclosed for filing find one original and eleven copies of the Comments of the Plunkett Family. Please note that I have included copies for each of the Commissioners.

Very truly yours,

R Plunkett

Rick Plunkett

No. of Copies rec'd 0+11
List ABCDE

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original

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of

Implementation of Sections of the Cable Television Consumer Protection Act of 1992; Rate Regulation

Leased Commercial Access

MM Docket No. 92-266

CS Docket No. 96-60

Comments of the Plunkett Family

These comments are submitted by Rick Plunkett on behalf of the Plunkett Family, which has owned cable systems in Minnesota and Wisconsin since 1964. Information about how the FCC's current leased access proposal would be figured for the Plunkett's five cable systems (10,000 subscribers) is detailed in Attachment A.

The FCC has not attempted to apply the statutory criteria required in developing the current proposal on leased access rates. The proposed rules would seriously adversely affect the "growth and development" of cable systems and would "adversely affect the operation, financial condition and market development" of cable systems. This is especially true of the Plunkett cable systems and small cable systems generally. Therefore, the proposed rules are contrary to the statute authorizing the proposed rules. The FCC should leave the current rules in place and start over in its analysis.

By restricting itself to a so called cost analysis, the FCC has failed to apply the analytical framework required by Congress in establishing leased access rates. The leased access rates and other terms of carriage must be fashioned in a way that is consistent with "*the growth and development*" of cable systems. 47 U.S.C. 532(a). Congress clearly stated that the price, terms and conditions of the leased access rules *"will not adversely affect the operation, financial condition, or market development of the cable system."* The FCC has restricted itself to asking what the cable operator's marginal out-of-pocket cost of adding or substituting a leased access programmer would be. The FCC has made no attempt to determine how the rules would affect small cable systems now in fierce competition with Direct TV (ATT/General Motors), Primestar (TCI and the other big MSOs) the telcos, MMDS operators (soon offering hundreds of digital channels) and other competitors. The FCC has failed to meet the explicit criteria established by Congress.

1. The proposed rules provide leased access for free. Attachment A details how rates would be calculated using the FCC's current proposal. The rates are negative. This is true for each of five (real) cable systems included in the Attachment. The FCC expects to take 10% to 15% of our network without compensation. This is not only contrary to the statute, but also contrary to the Constitution.

2. Small cable is more vulnerable to competition; lease access rules must be tailored for small cable in order to be consistent with the growth and development of small cable. The Congress and the FCC have on many occasions recognized that small cable has lower channel capacity, less access to capital and higher costs than the big MSOs. The trade literature and industry commentators have concluded that these factors make small cable especially vulnerable to DBS and other competitors. The FCC cannot fulfill its statutory mandate without giving special consideration to the affect of its rules on the growth and market development of small cable.

3. Small cable has much lower ad insertion revenue resulting in unfairly lowered leased access fees under the proposed rules. Local ad revenue for the cable industry averaged $27.58 per subscriber in 1995. See Attachment B,Article form MultiChannel News. Small cable frequently has zero ad revenue. In systems owned by this cable operator that have ad insertion, revenues were about one third the national average (system one and five on attachment A). Revenues net of expenses are similarly lower for small cable where ad insertion is possible at all The result under the FCC's proposed rules is that the leased access channel are available on the small system at a lower rate than at larger systems. Yet, the loss of channel space affects the *"growth and development"* of the small operator, already struggling with limited channel capacity and no capital for rebuilding, far greater than it does the urban MSO already operating an 80 channel system. The urban

MSO with large channel capacity can defend against the DBS competitor more effectively than can the small operator operating between 36 and 54 channels. The loss of precious channel space to leased access will seriously weaken small cable's ability to compete. Compensation from leased access providers must be sufficient to offset the marketing handicap on small cable imposed by the rules. If the FCC fails to do so, it will have failed to adhere to the Congressional mandate that the rules *"not adversely affect the operation, financial condition and market development"* of small cable.

4. Loss of channels to leased access will significantly affect subscriber penetration. The most significant competitive advantage that DBS has over cable is the variety of programming available on DBS. See Attachment C, Cable World Poll. This advantage is especially strong in competing against small cable operators with limited channel capacity. The FCC effectively admits that subscriber penetration will be affected by the rules, yet proposes a system that fails to account for it. The FCC concludes that a cable operator would not carry a network with a negative opportunity cost. Yet the average opportunity cost of the ad supported networks on this operator's cable systems ranges from a negative $.29 to $.38 /sub/month. The FCC explains that this apparently negative opportunity cost is only negative because it does not account for the subscriber penetration fostered by the networks. So while the FCC proposes rules that do not compensate the cable operator for diminished subscriber penetration, it also admits that networks removed or kept off the system have a significant affect on driving subscriber penetration. In this way the proposed rules are arbitrary and contrary to the Congressional mandate.

5. Even networks that charge little or no program fees strongly affect subscriber penetration. Networks with an apparent negative opportunity cost may significantly drive subscriber penetration, yet networks without ad insertion and which charge lower or no program fees also significantly affect subscriber penetration. It is widely held that cable's delivery of local broadcast networks is a significant advantage in competing with DBS for subscribers. Yet, most the great majority of cable systems pay nothing for the retransmission rights to the local broadcasters. Each network has its constituency. The Roman Catholic network, EWTN, charges no fees. Yet, this cable operator received significant subscriber requests for the network; loss of the network would result in dissatisfied customers more likely to switch to a competitor. In today's market a cable operator is seriously handicapped if he cannot offer a wide array of programming.

6. The FCC theory of leased access cost must be discarded if it cannot account for loss of market share. The FCC states that it cannot incorporate a potential loss of market share into its formulae because it is "too speculative". Yet, the FCC has been instructed by Congress to develop rules *"consistent with the growth and development"* of the cable industry. The fact that the FCC cannot incorporate a subscriber penetration factor into its theory of leased access indicates that the theory is unworkable, not that subscriber penetration (i.e. affect on *growth* and *market development*) should be discarded as a factor in setting leased access terms and conditions. A better approach would be to rely on the market to determine leased access rates, subject only to a broad inquiry as to whether the rates and term are reasonable.

7. Market prices should govern where effective competition exists, subject only to review for reasonableness. At the time of the 1984 Cable Act, cable was the only broadband delivery system to the home. It was in this context that Congress stated the purpose of the leased access section of the Act:

> "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. 532(a).

Things have changed since 1984. *Cable is no longer the gatekeeper.* Four different DBS service deliver up to 150 channels past every home in America. Particularly where effective competition exists, market rates should determine leased access rates. Absent an agreement to boycott, leased access rates offered by competitive suppliers of broadband access to the home can be deemed to have set rates at a reasonable level. Congress did not mandate that leased access be set aside for the impecunious, but only that the rates and terms be reasonable. Under market conditions of effective competition, those rates will be reasonable while at the same time not adversely affecting the *operation, financial condition or market development of the cable system"*.

8. The proposed leased access rules are subject to abuse by cable competitors not subject to the same obligation. At the time of the 1984 Cable Act, cable was the only broadband delivery system to the home. Things have changed since 1984. *Cable is no longer the gatekeeper* Four different DBS service deliver up to

150 channels past every home in America. Digital MMDS is due by the year's end. Many cable systems face "effective competition" as defined by Congress and the FCC. Yet, these competitors face no leased access obligation. Consider the community where a Video Dial Tone or Open Video System operates in competition with cable. The telco or its tenants can put infomercials promoting the OVS or VDT system on one or more cable channels full time. In doing so, the cable competitor has handicapped cable's ability to compete (cable no longer has capacity to add ESPN2, for example) while obtaining a beautiful sales tool in every cable subscriber's home. And what does the competitor pay for the privilege? Apparently nothing. Perhaps the cost of video tape players. Of course, cable would have to pay significant dollars to gain similar access to the OVS/VDT homes -- if it could get access at all. Now suppose ATT/General Motors (DirecTV) wants access to its competitors' customers' homes. Under the proposed rules, ATT could take a channel (or more) from every cable system in the country to promote its DirecTV system. What payments would ATT make to the cable operator? Apparently nothing. They would have to pay the VDT or OVS operator or its tenant. But access to cable households comes virtually without payment. In today's competitive video marketplace, market rates should apply to all leased access. To do otherwise will significantly and adversely affect cable's growth and development, contrary to the mandate of Congress

9. The proposed rules will anger subscribers, push subscribers to the DBS alternative and tarnish the cable operator's image. This operator recently undertook a network upgrade project to expand channel capacity (on system #1) from 35 to 38 channels. The project involved purchase of new line electronics, respacing amplifiers and various other capital and labor intensive tasks. In so doing we were able to add three networks to the system. Under the proposed rules, we may now have to remove *four* networks from the system. Yet, even though it cost hundreds of thousands to upgrade the network, the FCC will allow leased access programers (probably home shopping networks) to use the expanded capacity (four channels) without paying for it. The FCC's answer seems to be that I should charge my cable subscribers for the leased access programming. The problem is that the leased access programming is not what the subscriber wants. We examined the market carefully before deciding what to add to the line-up. Home shopping was not at the top the top of the list. We will have many many many angry subscribers if we drop existing networks to ad home shopping. Subscribers will eagerly shop for a DBS option that gives them the networks that they had grown accustomed to. Our reputation as a video supplier will be destroyed. The FCC has failed to propose rules consistent with growth and development of the cable systems.

10. Network upgrades will be discouraged under the proposed rules. An operator upgrading his plant from 300 MHZ (35 channels) to 450 MHZ (60 channels) looks forward to 9 of the new channels being turned over to leased access programmers. Thus, 37% of the increased channel capacity established at great expense goes to another party. Under the proposed rules, the "dark channels" lease rate is figured using the *lowest* positive opportunity cost of existing networks. Since many networks have a zero or close to zero opportunity cost (as incorrectly figured by the rules) the dark channel will be virtually given away. Bankers will not be impressed when we inform them that 37% of the capital we want to borrow will not bring any income to the cable company. The FCC's answer may be to charge the cable subscriber for the nine channels by wrapping an additional charge into the tier rate. Why? Why should my package of networks be tied to another, unwanted package? This will increase the cost of my package but without increasing its value. (Leased access programming is unlikely to increase the value of the tier; if leased access programmers could do that and if they were inclined to do that the programmers could compete with other programmers *for me to pay them* for the programming.). Instead, the leased access programmer should attempt to sell the programming in its own tier. We could facilitate collections for a fee; they would sell the programming separately without needlessly tieing it to my programming package. The fee to sell their tier must recognize the cost of construction and operation of the network and the billing system.

11. Small cable has higher transaction and other costs for leased access. Small cable operators have no in house counsel program contract departments. Therefor the cost of drafting and negotiating contracts cannot be combined into existing overhead costs as may be done for larger MSOs. Small cable will be forced to hire outside counsel for contract drafting and negotiation, resulting in significant expense proportionately greater than that incurred by larger companies. The FCC has not accounted for this increased cost for small cable operators. Other costs are also higher for small cable. Developing expertise on playback hardware and software will be an additional cost. Large companies typically have in house personnel already schooled in this area. For the small operator this is yet one more set of expertise that he will have to develop or hire. Drive time just to reach remote headends serving small communities also constitutes a significant expense not incurred by larger systems.

Respectfully submitted this 15 day of May 1996,

Rick Plunkett

Rick Plunkett
The Plunkett Family

Delivered by Federal Express on May 15. 1996 Fed Ex. Parcell # 4187978874

ATTACHMENT A

	Sys 1	Sys 2	Sys 3	Sys 4	Sys 5
Subs	5001	633	83	194	4350
Basic Rate	$22.20	$22.20	$19.70	$19.70	$22.78
Basic No of Channels	31	30	24	24	34
Ad Insertion # of Networks	8	0	0	0	4
Ad Insertion Annual Revenue	$19,323.00	$0.00	$0.00	$0.00	$14,470.00
Ave rev./sub/channel/month	$0.04	0	0	0	$0.07
Ad Net prog. fees/sub/mo.	$2.60	n/a	n/a	n/a	$1.80
Ave prog. fees/network/sub/mo.	$0.33	n/a	n/a	n/a	$0.45
Ave prog fees for non ad support networks/sub/month	$0.06	$0.12	$0.10	$0.10	$0.08
# Must Carry & PEG	1	1	1	1	2
Basic Prog. Fees	$3.83	$3.81	$3.15	$3.15	$4.31
Ave prog fee per channel					
Incl. M.Carry & PEG	$0.12	$0.13	$0.13	$0.13	$0.13
W/O M.Carry & PEG	$0.13	$0.13	$0.14	$0.14	$0.13
Ave charge per channel					
Incl. M.Carry & PEG	$0.72	$0.74	$0.82	$0.82	$0.67
W/O M.Carry & PEG	$0.74	$0.77	$0.86	$0.86	$0.71
Highest Penetrated Premium Net					
Subscriber Count	1025	136	10	54	391
Per cent penetration	20%	21%	12%	28%	9%
Margin on Premium Net	$2.79	$2.79	$2.79	$2.79	3.24
Opportunity Costs*					
Ad supported networks average	($0.28)	n/a	n/a	n/a	($0.38)
Non ad supported net average	($0.06)	($0.12)	($0.10)	($0.10)	($0.08)
*does not include unknown tech and admin costs					
Channel Charge					
Tier - ad supported net	$2,157.32	n/a	n/a	n/a	$1,258.46
Tier - non ad supported net	$3,281.30	$392.46	$59.83	$139.84	$2,566.50
Premium	$2,859.75	$379.44	$27.90	$150.66	$1,266.84
Cost Formulae Rate					
Using ad supported nets					
3 Tier channels 1 Premium cha	$2,332.93	n/a	n/a	n/a	$1,260.55
4 Tier Channels	$2,157.32	n/a	n/a	n/a	$1,258.46
Using non ad supported nets					
3 Tier channels 1 Premium cha	$3,175.91	$389.21	$51.85	$142.55	$2,241.59
4 Tier Channels	$3,281.30	$392.46	$59.83	$139.84	$2,566.50
Leased Access Cost Formula Programmer Charge					
Using ad supported nets					
3 Tier channels 1 Premium cha	($1,248.44)	($468.42)	($68.13)	($159.24)	($1,653.95)
4 Tier Channels	($1,424.04)	($468.42)	($68.13)	($159.24)	($1,656.04)
Using non ad supported nets					
3 Tier channels 1 Premium cha	($405.45)	($79.22)	($16.28)	($16.70)	($672.91)
4 Tier Channels	($300.06)	($75.96)	($8.30)	($19.40)	($348.00)

ATTACHMENT B

Multichannel NEWS

See BROADBAND WEEK Page 47

ESPN Tops Local Ad Revenue List

NEW YORK — Last year ESPN was the No. 1 network in terms of generating the biggest share of local ad revenue, accounting for 20 percent of all local ad billings generated in 1995, according to a study conducted by Bortz & Co. for the sports channel.

ESPN local ad revenue last year averaged $5.61 per subscriber, a 14 percent increase from $4.93 in 1994, according to the survey. Overall, average local ad revenue generated per subscriber last year was $27.58, so ESPN accounted for roughly one-fifth of that.

The networks that followed ESPN in local-ad revenue per subscriber, according to the Bortz study, were: Cable News Network ($5.05), Turner Network Television ($3.69), USA Network ($3.62), Discovery Channel ($1.91), Lifetime Television ($1.60) and A&E Network ($1.37).

The survey also found that ESPN's National Football League programming continued to score well with local advertisers. NFL game revenue per subscriber rose to $1.15 last year from 75 cents in 1994, according to the survey. And while the NFL represents less than 1 percent of total ESPN inventory, time sold during ESPN's NFL games represented more than 4 percent of total local ad revenue.

ESPN affiliates also reported that the NFL programming on the network continued to attract new advertisers to cable, and that 74 percent of these new clients placed subsequent buys on cable. MCN

MCN 5-13-96 p. 22

CABLE WORLD

ATTACHMENT C

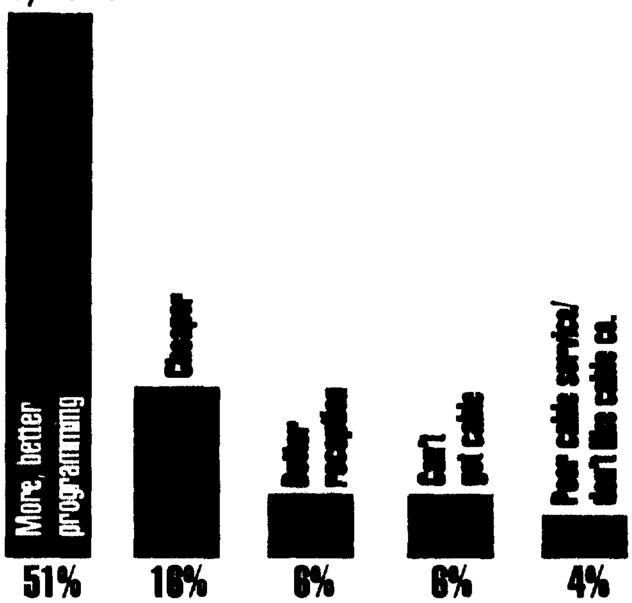
Vol. 8 No. 18
April 29, 1996

CABLE WORLD POLL

CABLE WORLD CONSUMER POLL

Dish Decision

"What are the main reasons you would consider purchasing an 18-inch satellite dish system?"



Source: Talmey-Drake Research & Strategy Inc.